TABLE OF CONTENTS

	Page
Interest of Respondent	1
Statement	3
Argument	6
Petitioner Fails to Raise a Substantial Constitutional Question	6
The Entitlements Program Is Fully Authorized by Statute	9
Conclusion	11

INDEX OF CITATIONS

CASES:

Accord Alton v. United States, 401 F.2d 896 (9th Cir. 1968)	8
Algonquin, SNG, Inc. v. FEA, 518 F.2d 1051 (D.C. Cir. 1975), *cert. granted*, 96 S.Ct. 265 (1975)	10
Block v. Hirsch, 256 U.S. 135 (1921)	9
Cities Service Co. v. FEA, No. DC-34 (TECA, December 31, 1975), *petition for cert. filed* (No. 75-1230, February 27, 1976)	3, 6, 9, 10
Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950)	9
Exxon Corp. v. FEA, Civil No. 75-150 (D.N.J., filed January 30, 1975), *dismissed for lack of jurisdiction*, 516 F.2d 1397 (TECA 1975)	2
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	7
Gulf Oil Corp. v. FEA, 391 F. Supp. 856 (W.D.Pa. 1975), *dismissed for lack of jurisdiction*, 521 F.2d 810 (TECA 1975)	3
Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884)	6

Page

Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871) 7, 9
Lichter v. United States, 334 U.S. 742 (1948) 8, 9
Louisville Bridge Company v. United States, 242 U.S. 409 (1917) 8
Mitchell v. United States, 267 U.S. 341 (1925) 7
Moon v. Freeman, 379 F.2d 382 (9th Cir. 1967) 6
North American Co. v. Securities and Exchange Commission, 327 U.S. 686 (1946) 7
Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA 1975) 3, 9
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).. 9
Railroad Commission v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) 9
Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943) 6
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 7
Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) 9
United States v. Butler, 297 U.S. 1 (1936) 6
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) 9

STATUTES:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-756 1
§ 753(b)(1) 5
Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 1
§ 401 4
§ 403 5

MISCELLANEOUS:

10 C.F.R. §§ 211.62, 211.67 (1975) 2
41 Fed. Reg. 4931, 1976 4
Federal Rules of Civil Procedure, Rule 24(a) 2
S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93rd Cong., 2nd Sess., at 2 (August 9, 1975); H. Rep. No. 93-1443, 93rd Cong., 2nd Sess., at 3 (October 8, 1974) 5

BLEED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1259

MARATHON OIL COMPANY, *Petitioner*

v.

FEDERAL ENERGY ADMINISTRATION; FRANK G. ZARB, Administrator, Federal Energy Administration; and ASHLAND OIL, INC., *Respondents*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

BRIEF FOR RESPONDENT ASHLAND OIL, INC. IN OPPOSITION

Respondent Ashland Oil, Inc. ("Ashland") submits this brief in opposition to the petition of Marathon Oil Company for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals.

INTEREST OF RESPONDENT

The Emergency Petroleum Allocation Act of 1973 [1] and the Energy Policy and Conservation Act of 1975 [2] were enacted in part to protect and foster the competi-

[1] 15 U.S.C. §§ 751-56 (the "Allocation Act").

[2] Pub. L. 94-163, 89 Stat. 871 (the "Energy Policy and Conservation Act").

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tive viability of independent petroleum companies by assuring them access to supplies of petroleum at competitive prices. Ashland is an independent refiner of petroleum products as that term is defined in the Allocation Act and benefits from regulatory programs established by respondents, the Federal Energy Administration ("FEA") and Frank G. Zarb to equalize feedstock costs of domestic refiners.[3]

Ashland purchases 82% of its crude oil feedstocks from sources it neither owns nor controls; 60% of its crude oil runs consist of imported crude oil which is priced at approximately $13.40 to $14.25 per barrel. By contrast, a majority of petitioner's crude oil runs and the crude runs of most major oil companies are domestic crude oil subject to a price ceiling of $5.25 per barrel. The entitlements program challenged and upheld below preserves Ashland's economic viability by equalizing the costs of its raw materials with those of the major companies. If Ashland were denied access to the competitive advantages of price-controlled domestic crude oil, it would be unable to compete with petitioner and other major companies.

To protect its interest in the entitlements program, Ashland was permitted by the district court to intervene in the proceedings below pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. Ashland also has intervened or appeared as *amicus curiae* in four similar actions challenging the program.[4]

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[3] 10 C.F.R. §§ 211.62, 211.67 (1975), Petitioner's Appendix, at 46a-57a (the "entitlements program" or "cost equalization program").

[4] Ashland is intervenor in *Exxon Corp.* v. *FEA*, Civil No. 75-150 (D.N.J., filed January 30, 1975), *dismissed for lack of jurisdiction*, 516 F.2d 1397 (TECA 1975) and has appeared as *amicus curiae*

BLEED

STATEMENT

The entitlements regulations is one element of an extensive regulatory scheme which today touches virtually every facet of the petroleum industry. Although it initially was conceived as a response to acute petroleum shortages that accompanied the Arab Oil Embargo in October 1973, the program has survived, with modifications, to address continuing economic dislocations. Thus, FEA, exercising its mandatory authority under the Allocation Act has controlled prices and allocations of crude oil and petroleum products for a period of almost two and one half years. These controls extend to nearly every crude and product transaction at every level of production and distribution.

The entitlements program, though providing for cash transfers among refiners, does not constitute an enforced subsidy of any segment of the petroleum industry. Rather, it is a remedial tool designed to ameliorate fundamental problems created by other aspects of the regulatory program. These problems stem from economic and competitive distortions that emerged in 1974 as the result of FEA's adoption of a two-tier price system for crude oil.

Since 1973, FEA has recognized two types of domestic crude oil: "old oil" which is controlled at approximately $5.25 per barrel and "new", "released" and "stripper" oil, prices for which have been allowed to seek market levels—approximately the price of im-

in *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (TECA 1975); *Cities Service Co.* v. *FEA*, No. DC-34 (TECA, December 31, 1975), *petition for cert. filed* (No. 75-1230, February 27, 1976); and *Gulf Oil Corp.* v. *FEA*, 391 F.Supp. 856 (W.D. Pa. 1975), *dismissed for lack of jurisdiction*, 521 F.2d 810 (TECA 1975).

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ported crude dictated by the Organization of Petroleum Exporting Countries (as indicated above, $13.40 to $14.25 per barrel).[5] The two-tier price system is employed by FEA in a twin-faceted effort to limit the inflationary impact of rising world petroleum prices and to encourage exploration for and production of new domestic petroleum reserves. FEA largely has achieved its policy objectives. The impact of rising world energy prices upon domestic crude prices has been moderated while incentives for increased domestic production are preserved.

By the summer of 1974, it was evident to FEA that the two-tier price structure, despite its salutory effects, had severe and unanticipated economic consequences for the independent sector of the petroleum industry. Because most small and independent refiners traditionally were crude deficient (relying heavily upon foreign imports), their crude acquisition costs had risen dramatically. By contrast, major integrated companies were windfall beneficiaries of the two-tier system, since they owned or controlled the majority of available domestic "old oil" which enjoyed, solely due to governmental action, an immense competitive advantage in the marketplace.[6] Small and inde-

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[5] The Energy Policy and Conservation Act, § 401 requires downward adjustments in prices of all domestic crude oil. Under regulations effective February 1, 1976 (41 Fed. Reg. 4931, 1976) a three-tier price system was adopted. Henceforth "old oil" is controlled at $5.25 per barrel and the remaining domestic crude oil, or "upper tier" crude is controlled at an average of $11.28 per barrel. A third tier consists of imported oil not subject to price controls.

[6] Petitioner cites its past expenditures in exploration and production as a basis for its ownership of "valuable" domestic production, claiming property rights in "old oil". Petitioner's Brief, 4, n.3. Any value associated with access to "old oil", however,

pendent refiners suffered severe losses in earnings and market share and, in some cases, were forced to curtail refinery production. As a result, independent marketers of petroleum products that were customers of independent refiners, suffered similar losses and injury.

FEA responded to the problem with the entitlements program which seeks to distribute the benefits of price-controlled domestic oil equitably among all domestic refiners. This was consistent with FEA's mandate to protect the viability of small and independent refiners[7] and was twice reviewed and approved by Congress.[8]

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results from operation of FEA pricing regulations. Petitioner has chosen not to challenge the two-tier price system itself either on statutory or constitutional grounds. Therefore, its capital expenditures are not relevant to the issues raised by its petition.

[7] The Allocation Act, 15 U.S.C. § 753(b)(1) provides in relevant part:

> ". . . The regulation . . . to the maximum extent practicable, shall provide for . . .
>
> "(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the production, refining, distribution, marketing and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers; . . ."

[8] During consideration of the first extension of the Allocation Act, the entitlements program was reviewed by both Senate and House Commerce Committees. While Congress declined to mandate a cost equalization program, the Committee reports noted that Congress withheld action only upon a commitment from FEA that the entitlements program would be established. S. Rep. No. 93-1082, Comm. on Interior and Insular Affairs, 93rd Cong., 2nd Sess., at 2 (August 9, 1975); H. Rep. No. 93-1443, 93rd Cong., 2nd Sess., at 3 (October 8, 1974). The Energy Policy and Conservation Act, § 403 makes reference to the entitlements program and mandates specific agency action with respect to certain aspects of the cost equalization mechanism.

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ARGUMENT

Petitioner Fails to Raise a Substantial Constitutional Question

Petitioner challenges the constitutionality of the entitlements program on the ground that the program takes property without compensation in contravention of the fifth amendment.[9] In petitioner's view, this is an issue of national significance which raises novel questions not properly decided by the lower courts. Ashland submits to the contrary, that petitioner's constitutional claim is both familiar and without substantial merit.

The entitlements program is responsive to broad Congressional mandates contained in the Allocation Act and is part of a comprehensive regulatory scheme designed to assure adequate supplies of petroleum prod-

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[9] In a companion petition, *Cities Service Co.* v. *FEA*, *supra*, Cities contends that the program is constitutionally defective in that it imposes a tax upon refiners who are buyers of entitlements. In disposing of this argument, TECA properly relied upon the *Head Money Cases (Edye* v. *Robertson)*, 112 U.S. 580 (1884) wherein the Court held that burdens imposed incident to a regulatory program do not constitute a tax. In this regard, the decision rendered in *United States* v. *Butler*, 297 U.S. 1 (1936) has continued vitality and also is relevant. In that case, it was argued that one aspect of a regulatory program was a tax and therefore lawful despite other possible constitutional defects in the program. The Court did not agree:

> ". . . A tax in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effect regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation . . ."

See also Moon v. *Freeman*, 379 F.2d 382 (9th Cir. 1967); *Rodgers* v. *United States*, 138 F.2d 992 (6th Cir. 1943).

ucts, encourage increased domestic production and preserve and foster competition within the industry. It enables the United States to maintain the two-tier price system, and thereby to prevent the OPEC cartel from determining the price of domestic crude oil, without threatening the independent sector of the industry.

A challenge to the program is a challenge to the authority of Congress itself. It is fundamental that the powers of Congress under the commerce clause are as broad as the economic needs of the nation. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). In the context of economic regulation, Congress is fully empowered to deal directly and specifically with forces which in its judgment should not be permitted to prejudice or dislocate any important segment of an industry or the economy as a whole. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940); *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686 (1946). Under these principles, the entitlements program, as part of a broad economic regulatory mechanism, is a classic example of the proper exercise of the commerce power.

Petitioner contends nonetheless that the program will not withstand constitutional scrutiny because it effects a taking of property without just compensation. To succeed in this claim petitioner must establish, first, that it has a vested right in the property at issue, *Mitchell* v. *United States,* 267 U.S. 341 (1925) and, second, assuming such a property right exists, that any diminution in its value results from direct rather than merely consequential governmental action. *Legal Tender Cases* (*Knox* v. *Lee*), 79 U.S. (12 Wall.) 457 (1871). Petitioner fails to meet either requirement.

Petitioner is the beneficiary of pricing regulations which enhance the value of "old oil" which it owns or controls. The entitlements program has limited these advantages by requiring petitioner to share the benefits of price-controlled crude with its crude deficient competitors. Viewed in this light, the FEA has done no more than neutralize with one program the benefits which it conferred by a prior program. *A fortiori*, petitioner has no claim to compensation unless it can establish a vested right in the "property" at issue. However, any value associated with price-controlled domestic oil results exclusively from pricing regulations established by FEA.[10] In these circumstances, petitioner's interests are purely defeasible. *Louisville Bridge Company* v. *United States*, 242 U.S. 409 (1917); *Lichter* v. *United States*, 334 U.S. 742 (1948).[11] As the Court noted fifty years ago in *Louisville Bridge Co.* v. *United States, supra:*

> "... [W]hen private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of [the commerce] power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, ..." 242 U.S. at 417.

Even if petitioner could assert a vested right to its possession of price-controlled oil, it would not be en-

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[10] Petitioner does not contend that it is deprived of property because the controlled price is less than its market value. *See* note 6, *supra*.

[11] *Accord Alton* v. *United States*, 401 F.2d 896 (9th Cir. 1968).

titled to compensation, since at most the effect of the entitlements program upon petitioner is indirect and consequential. *Legal Tender Cases, supra; Cf. Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The regulation at issue here is an integral part of a program of price controls. While price restrictions of this kind may diminish the value of property, they do not constitute a direct taking. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Block* v. *Hirsch*, 256 U.S. 135 (1921). In the area of economic regulation, the powers of Congress under the commerce clause are extremely broad, particularly in times of fundamental economic change, as is the case with respect to the petroleum industry. *United States* v. *Central Eureka Mining Co.; supra* at 168; *Lichter* v. *United States, supra.*[12] In this regard, it is also important to note that petitioner is permitted to recover its entitlements costs in the market place and has done so. In these circumstances, there is no appropriation or servitude, direct or indirect.

The Entitlements Program Is Fully Authorized by Statute

Citing asserted inconsistencies between TECA's decisions in *Cities Service Co.* v. *FEA, supra* and *Pasco, Inc.* v. *FEA, supra* and a recent decision of the United

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[12] Petitioner's reliance upon *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937) is misplaced. In *Thompson*, the Court held that a gas proration order designed to prevent waste could not constitutionally be employed as a subsidy in aid of disadvantaged competitors. However, subsequent decisions clearly limit the holding in *Thompson* to its specific facts. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179 (1950). The entitlements program does not award a subsidy. Rather, as described *supra*, it is a remedial mechanism which is an integral part of the regulatory program.

States Court of Appeals for the District of Columbia in *Algonquin, SNG, Inc.* v. *FEA*, 518 F.2d 1051 (D.C. Cir. 1975), *cert. granted*, 96 S. Ct. 265 (1975), petitioner seeks review on the additional ground that the entitlements program is not authorized by statute. This argument also is without merit.

In *Algonquin*, the court of appeals held one aspect of the oil import program unlawful on the ground that it was not authorized by a clear statutory directive. In contrast, the entitlements program stands upon a totally different statutory base, and twice has been considered by Congress and approved.[13] Moreover, as stated by TECA in its *Cities Service* decision, the Allocation Act sets forth broad mandates containing ample authority for the program.

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[13] *See* note 8, *supra*.

CONCLUSION

The decision of the Temporary Emergency Court of Appeals is sound and correct. The petition accordingly should be denied.

Respectfully submitted,

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